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Nos. 84-816, 84-824, 84-856

Office-Supreme Court, U.S.
FILED
JAN 7 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF WISCONSIN, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

FLORIDA PUBLIC SERVICE COMMISSION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED *

1. This Court ruled in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930), that, under the statutory antecedents to the Communications Act of 1934, local telephone exchange costs must be apportioned between those attributable to interstate service and those attributable to intrastate or local service. The Federal Communications Commission issued orders setting guidelines for the manner in which such costs, once allocated to interstate service, are to be recovered. To recover a portion of these costs, the guidelines would impose charges on end users who receive access to interstate service through the local exchange. Did the court below affirm the Commission's orders consistently with *Smith*?

2. Did the court below correctly decide that the Commission had jurisdiction to require local telephone companies to impose charges on their subscribers for re-

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* The following companies join in this Brief: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Telephone Company, New Jersey Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, New York Telephone Company, New England Telephone and Telegraph Company, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company.

Each of the foregoing Bell Operating Companies is a wholly owned subsidiary of a Bell Regional Holding Company, that is, American Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group or Southwestern Bell Corporation. Each Regional Holding Company has outstanding securities in the hands of the public.

covering the costs the companies incur to provide their subscribers access to the interstate telephone network?

3. The court below determined that the Commission's decision to issue rules requiring access charges was not unlawful, arbitrary or unreasonable. Did the court below properly make that determination and affirm the Commission's decision on the basis of that standard?

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BRIEF OF BELL OPERATING COMPANY RESPONDENTS IN OPPOSITION

The Bell Operating Companies, Respondents here, intervened below in the Court of Appeals for the District of Columbia Circuit in support of the Federal Communi-

cations Commission. Respondents submit this Brief in Opposition to the Petitions for Writs of Certiorari to review the Court of Appeals' decision filed by Petitioners the Florida Public Service Commission, the New York State Department of Public Service, the Public Service Commission of Wisconsin, the State of Michigan and the Michigan Public Service Commission.

STATEMENT OF THE CASE

The Federal Communications Commission determined in a series of orders to establish guidelines for new charges to recover the costs incurred by local telephone exchange companies in providing access to the interstate telephone network.[1] Among the charges the Commission required was a monthly "access charge" to be imposed by telephone exchange companies on their subscribers to cover partially the cost of providing these end users access to interstate service. The Court of Appeals unanimously affirmed the Commission's decision to impose the end user access charge.[2]

Petitioners challenge the Court of Appeals' decision on three general grounds. They contend first that it is inconsistent with the jurisdictional division set forth in the statutory antecedents to the Communications Act of 1934, as this Court construed them in *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930).[3] Related to

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[1] The Commission's *Third Report and Order*, its initial access charge order, is reported at 93 F.C.C.2d 241 (1983). The Commission subsequently modified this order on reconsideration, 48 Fed. Reg. 42,984 (1983), and on further reconsideration, 49 Fed. Reg. 7810 (1984).

[2] *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). In other respects, the Court of Appeals affirmed the Commission's orders in principal part, remanding for further consideration two limited aspects of the orders irrelevant to the issues here.

[3] Fla. Pet. at 9-10, 21; N.Y. Pet. at 13.

this jurisdictional claim are further claims that the court incorrectly ruled the Commission's actions were within the jurisdictional limitations set forth in Sections 2(b)(1) and 221(b) of the Communications Act, 47 U.S.C. §§ 152(b)(1), 221(b), which prohibit Commission regulation of intrastate matters,[4] and Section 2(b)(2), 47 U.S.C. § 152(b)(2), which Petitioners claim precludes Commission jurisdiction to require local exchange operating companies to impose access charges.[5] Finally, Petitioners contend that the court should have invalidated the Commission's decision as discriminatory and unreasonable.[6]

Petitions to review the decision below have already been filed by the National Association of Regulatory Utility Commissioners in No. 84-95 and the National Association of State Utility Consumer Advocates in No. 84-504. Respondents briefly set forth here a statement of the case necessary for addressing the questions the new state Petitioners present. A more detailed statement pertinent to this case is set forth in Respondents' Brief in Opposition to the NARUC Petition.

The interstate costs whose means of recovery is the subject of Petitioners' challenge include essentially the costs of installing and maintaining the so-called telephone subscriber "loop." The loop primarily consists of the line connecting a telephone subscriber to the central office. Through this line, the subscriber may make or receive local calls or long distance calls. The costs of providing and maintaining the loop are not traffic sensitive. That is, they do not depend on the volume or frequency of calls made over the loop.

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[4] Wis. Pet. at 18-20; Fla. Pet. at 11-12; N.Y. Pet. at 5-7, 14-16.

[5] Wis. Pet. at 11-18; N.Y. Pet. at 7-12.

[6] Fla. Pet. at 17-26.

Through the jurisdictional "separations" process established under Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), these non-traffic sensitive ("NTS") costs are allocated between the interstate jurisdiction of the Commission and the intrastate jurisdiction of the states. There is no dispute in this case that this allocation is required by this Court's decision in *Smith v. Illinois Bell Telephone Co.*; nor is there any dispute about the method the states and the Commission use to allocate these NTS costs. Rather, the dispute here is about how the Commission may go about imposing charges for recovering the NTS costs allocated to its jurisdiction.

For many years, these interstate NTS costs have been recovered through long-distance charges made on a usage basis depending on time and distance. Heavy interstate users, therefore, paid many times the interstate portion of their loop costs, while light users—whose loops cost just as much to maintain—paid only a small fraction of the same costs.

Petitioners contend that the charges necessary to recover interstate NTS costs may only be imposed when interstate calls are actually made. The Commission, however, determined to impose a charge on each subscriber to recover the NTS costs actually incurred to provide that subscriber access to the interstate telephone network. The fundamental purpose of the Commission's plan was to shift cost burdens to persons who caused them and to eliminate the unfairness of existing recovery methods for interstate NTS costs.[7]

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[7] Persons actually making interstate calls, however, would continue to be charged to recover traffic sensitive costs, that is, costs that are a function of the calls actually made. They would also pay some NTS costs passed on to them by interstate carriers, who are subject to a charge for their access to the local exchange that is not at issue here.

The Commission, in making its determination, sought to balance four objectives and arrive at a result that would be in the public interest. It sought to ensure universal telephone service, that is, service at costs affordable to all. It sought to eliminate discrimination through unjustifiable differences in charges. It sought an allocation of costs that would encourage economic efficiency in the interstate telephone network. Finally, it sought to avoid interstate charges so high as to encourage large volume users to avoid or "bypass" the local exchange, placing them beyond the reach of the exchange's interstate charges and thereby increasing the interstate charges for those subscribers remaining on the exchange.[8]

Taking these objectives into consideration, the Commission decided that a portion of the total NTS costs under its jurisdiction should be recovered by a flat-rate, rather than usage-based, access charge imposed on each telephone subscriber line. The end user access charge in effect reflects some, but not all, of the cost of each subscriber's loop that has been incurred to make interstate service available to that subscriber. Not only would this approach more equitably place costs on the cost causer, the Commission reasoned, but also it would allow interstate toll rates to be lower than they otherwise would have to be, thus reducing the risk of bypass of the local exchange.

The universal service objective, however, required the Commission to temper the implementation of its end user access charge approach and allow end users time to adjust to the effects of fully recovering NTS costs

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[8] Where short-haul communications links, such as microwave systems or private cables, can be obtained at costs less than those incurred under a usage-based rate structure, there is a strong, artificial incentive for high-volume users to bypass the local exchange and connect directly with an interstate carrier by building private communication links between their places of business and the interstate carrier's local "point-of-presence."

through access charges.[9] Thus, the Commission has imposed separate flat-rate access charges for residences (and single line business users) and multiline business users, and in nearly all areas, the two nationwide rates are well below the total interstate NTS costs allocated on a per line basis. Over a period of time, however, increasing amounts of interstate NTS costs may be recovered through gradually increasing the flat rates.[10]

The Commission also undertook to address universal service in two other ways. First, it committed to institute proceedings to define a category of subscribers needing access charge relief. Second, it created a Universal Service Fund. Through this mechanism, a portion of any area's NTS costs above the national average would be distributed for recovery nationwide as an element of access charges also to be imposed on interstate carriers.

The Court of Appeals decided that the Commission's determinations were not unreasonable and that nothing in the Communications Act precluded the imposition of a flat-rate access charge on local exchange subscribers to recover local exchange costs incurred to provide them interstate service. Responding to claims that the end user access charge did not recover interstate costs from the interstate network and effectively repealed the allo-

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[9] "We have . . . concluded that some adjustment in flat end user common line access charges must be made in order to balance the critical need to move towards a rational cost-based pricing system for access plant with the maintenance of universal service." *Third Report and Order*, 93 F.C.C.2d at 291. "[W]e have selected a low residential minimum in order to avoid an adverse effect upon universal service." *Id.* at 292.

[10] The balance of NTS costs not recovered from charges directly on end users will be recovered from the access charges on interstate carriers that are not at issue here. See discussion, *supra*, p. 4 n.7.

cation of costs between the interstate and intrastate jurisdictions, the court reasoned that such claims:

> "confuse or blend two questions: (1) jurisdiction or authority to recover costs; (2) the manner in which costs are to be recovered." 737 F.2d at 1112.

It then ruled that *Smith v. Illinois Bell Telephone Co.* addressed only the first question.

The court acknowledged the *Smith* admonition that "unless an apportionment [of exchange costs] is made, the intrastate service to which the exchange property is allocated will bear an undue burden." [11] The court ruled, however, that this language merely required that costs related to interstate service not be a part of the costs used in calculating the charges for local exchange service. *Id.* at 1112 n.18. It did not preclude recovering interstate costs from the persons for whom they were incurred.

The court also rejected arguments that the access charge was an exercise of jurisdiction over local charges contrary to the prohibitions of Section 2(b)(1) of the Communications Act. In response to claims that the charge was, in effect, a condition of local service, the court reasoned and decided:

> ". . . The end user charge reflects costs caused not by a subscriber's actually making interstate calls, but by the subscriber's connection into the interstate network . . . . [These l]ocal telephone plant costs are real; they are necessarily incurred for each subscriber by virtue of that subscriber's interconnection into the local network, and they must be recovered regardless of how many or how few interstate calls (or local calls for that matter) a subscriber makes . . . ." 737 F.2d at 1113-14.
>
> "The scheme advanced by the FCC simply requires all telephone subscribers to pay, on a per line basis, for that portion of *their necessarily-incurred local*

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[11] 282 U.S. at 151.

telephone plant costs assigned under *Smith* to the interstate jurisdiction." *Id.* at 1115 (emphasis in original).

Responding to claims that the access charge was an exercise of jurisdiction over "connecting carriers" contrary to the prohibitions of Section 2(b)(2),[12] the court noted Section 2(b) expressly makes connecting carriers subject to Sections 201 to 205 of the Act, 47 U.S.C. §§ 201-05. Section 2(b)(2), therefore, did not preclude Commission prescription of just and reasonable charges under Section 205 if the Commission found connecting carrier interstate rates unlawful, as it did, along with the interstate rates of all other exchange carriers.

Finally, the court held that Section 221(b) was irrelevant to claims that the access charge was in excess of the Commission's jurisdiction. That provision " 'was merely intended to preserve state regulation of local exchanges that happen to overlap state lines.' " 737 F.2d at 1113 n.21, quoting *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982), *cert. denied*, 103 S. Ct. 2109 (1983) (*"Computer II"*).

SUMMARY OF ARGUMENT

This Court's decision in *Smith v. Illinois Bell Telephone Co.* required only that the costs of operating the local exchange be apportioned between those attributable to interstate service and subject to federal jurisdiction and those attributable to intrastate or local service and subject to state jurisdiction. It did not prescribe how these costs, once apportioned, were to be recovered by the respective jurisdictions. Thus, in upholding the Commission's decision to require a charge to recover these costs from persons for whom they were incurred, the Court of Appeals ruled consistently with this Court's decision in *Smith.*

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[12] *See* 47 U.S.C. § 153(u) (defining the carrier described in Section 2(b)(2) as a "connecting carrier").

Similarly, the court correctly ruled that the Commission's access charge decision did not exceed the Commission's authority under the Act. An increasingly lengthy line of cases, none of which has prompted the need for review here, has rejected the view that Sections 2(b)(1) and 221(b) of the Act preclude Commission regulation of interstate matters that also affect matters of intrastate concern. *See Computer II, supra; North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (*"NCUC II"*); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (*"NCUC I"*). Because the Commission required the end user access charge to recover costs incurred in providing interstate service, the charge is plainly within the Commission's jurisdiction. Indeed, because the access charge decision neither displaces nor preempts any state regulation, its effect on matters of state concern barely begins to approach the preemptive effects that were nevertheless not a bar to Commission jurisdiction in *NCUC I* and *II* and *Computer II*.

Because Section 2(b) expressly subjects "connecting carriers" to the Commission's authority to prescribe rates under Sections 201 to 205, the court also correctly ruled that the Commission could require local exchange companies to impose access charges, whether or not, under Section 2(b)(2), such companies were connecting carriers not otherwise subject to Commission jurisdiction.

Finally, in response to claims that the Commission's access charge decision was arbitrary and discriminatory, the court carefully examined the Commission's rationale in reaching that decision. Having determined according to the applicable standard of judicial review that the Commission's decision was adequately supported and reasonable, the court properly upheld the Commission's decisionmaking.

In short, the Commission's actions confronted the Court of Appeals below merely with over worn questions of Commission jurisdiction. The court correctly decided these long settled questions and similarly undistinguished questions as to the soundness of the Commission's decision-making. Indeed, though couched as legal issues, the grievance the states press here is really with the allocation of jurisdiction between the Commission and the states that Congress established in 1934 when it enacted the Communications Act. Plainly, this is a legislative matter, and there is, therefore, no need for further review here.

ARGUMENT

I. The Court Below Upheld the Commission's Access Charge Decision Consistently with *Smith v. Illinois Bell Telephone Co.*

The claim that the Court of Appeals ruled inconsistently with this Court's decision in *Smith v. Illinois Bell Telephone Co.* is treated in depth in the Bell Operating Company Respondents Brief in Opposition in No. 84-95. Here, therefore, it is sufficient briefly to note that in *Smith* this Court merely held that that "[t]he separation of the intrastate and interstate property, revenue and expenses" was required for ratemaking purposes. 282 U.S. at 148. Apart from admonishing that "intrastate service" should not be burdened with the costs of interstate service, *id.* at 151, however, *Smith* did not prescribe how costs allocated to interstate service were to be recovered. In particular, it neither set forth guidelines or principles governing rate structures nor defined the persons subject to charges for interstate costs.

The Commission here has determined that, because the local exchange maintains facilities to provide each subscriber interstate service, each subscriber should pay a portion of the interstate NTS costs allocated to the Commission's jurisdiction in accordance with *Smith*. Although

this means that all local exchange subscribers will pay an end user access charge, whether or not they actually make interstate calls, it is nevertheless true that the access charge for interstate NTS costs is in every instance only imposed on persons for whom those costs are incurred and only imposed to recover costs attributable to interstate service. In short, the court below ruled consistently with *Smith* in upholding the Commission's access charge decision.

II. The Court Below Correctly Ruled That the Commission Did Not Exceed Its Jurisdiction in Requiring an End User Access Charge.

In addition to arguing that the Commission's actions were contrary to the jurisdictional principles set forth in *Smith* under the Communications Act's statutory antecedents, Petitioners argue that limitations set forth in Sections 2(b) and 221(b) of the Act have been transgressed.[13] Courts of appeals in several prior cases, however, have already rejected this view without having prompted further review here. The court below also correctly rejected the view, and its actions, therefore, are not worthy of review here either.

A. Sections 2(b)(1) and 221(b) of the Communications Act Do Not Deprive the Commission of Authority To Require End User Access Charges.

Section 2(b)(1) of the Communications Act denies the Commission jurisdiction to regulate "charges . . . for or in connection with intrastate communication service." The access charges challenged here, however, are interstate charges. Although Petitioners, through prodigious efforts at obfuscation, generally claim that the end user access charge is unlawful because it is in reality a local charge

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[13] Wis. Pet. at 19-20; Fla. Pet. at 11-12; N.Y. Pet. at 5-7.

that burdens intrastate service with interstate costs, their claims are simply misplaced.[14]

In particular, the access charge is determined solely on the basis of interstate costs, which no one disputes are the subject of Commission jurisdiction. Neither intrastate costs nor the amount of a subscriber's local calling enter into the calculation of the charge. Rather, it is imposed to recover the cost, and only the cost, of making interstate service available. The access charge, therefore, is neither a burden on intrastate service nor a charge for intrastate service.

Claims that the access charge is impermissible because it is not a function of actual use of the local exchange for long distance calling simply sidestep the issue.[15] The charge is still interstate in nature because it is imposed to recover costs that are unavoidably incurred for the purpose of making interstate access available to each local exchange subscriber, whether or not the subscriber actually makes long distance calls.

The access charge is also no more a local charge because it is a condition of local service than local charges are interstate because they are a condition of interstate service.[16] Because the same facilities are used in common to provide local and interstate service, acquisition of one use is unavoidably a condition of acquisition of the other.

To assume, as Petitioners clearly do,[17] that local exchange subscribers are persons subject only to the intrastate jurisdiction of the states and, therefore, are not persons subject to access charges begs the question as to

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[14] Wis. Pet. at 20, 23; Fla. Pet. at 7, 11, 14, 17.

[15] Wis. Pet. at 20.

[16] Wis. Pet. at 21.

[17] *See* Wis. Pet. at 20, 23; Fla. Pet. at 11, 14; N.Y. Pet. at 13, 15-16.

how the Commission's jurisdiction may be exercised to recover interstate NTS costs. To be sure, a local subscriber is subject to intrastate jurisdiction, but the subscriber is also necessarily an interstate subscriber, because, whether or not the subscriber makes interstate calls, the subscriber is afforded interstate access for which costs are incurred.

It is, therefore, a fiction to argue as Petitioners do that the ratepayers of the interstate jurisdiction are persons distinct from intrastate ratepayers. Because the interstate access and local access the local exchange provides are physically inseparable, each local exchange subscriber is also an interstate subscriber subject to interstate charges. The end user access charge, therefore, is not the exercise of jurisdiction over "charges . . . for or in connection with intrastate communication service" that Section 2(b)(1) prohibits.[18]

Were Section 2(b)(1) of the Communications Act construed to limit the Commission to recovering interstate costs from only interstate carriers and their customers, the Commission would be powerless to address matters directly affecting the economic viability of the interstate network and to avoid rate discrimination, even though

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[18] This conclusion is not changed even considering that the Communications Act sought to withhold from the Commission the type of jurisdiction supported by the "Shreveport Doctrine." *See Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914). The "Shreveport Doctrine" sanctioned the exercise of federal authority directly over intrastate rail rates because of the indirect effect that those rates had on interstate rail transportation. *See Hearings on H.R. 8301 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 134, 136, 145 (1934); *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 153, 155, 156, 179 (1934). The imposition of access charges, however, is not such an exercise of authority. Not only is it the regulation of matters directly affecting interstate commerce, but, indeed, it is the regulation of interstate commerce itself, for the access charge is only an interstate charge.

addressing such matters is among the purposes for which the Commission was created and even though it has long been held that the Commission's powers are extensive enough to permit it to effect the purposes for which it was created.[19]

Among other things, the Commission was created "to make available, so far as possible, . . . a . . . wire . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151. More specifically, Section 201(b) of the Act, 47 U.S.C. § 201(b), makes it clear that among the Commission's purposes is the issuance of "such rules and regulations as may be necessary" to ensure that "all charges, practices, classifications and regulations for and in connection with [interstate] communication service [are] just and reasonable." *See also* Section 205, 47 U.S.C. § 205 (authorizing Commission prescription of charges if existing charges are found to be unlawful).

The Commission has determined that the access charge is necessary to protect the economic viability of the interstate system and to permit costs related to interstate service to be recovered from all persons for whose benefit they are incurred, rather than placing a disproportionate share of those costs on some of the persons served by the interstate network. The Commission's access charge decision, therefore, is a perfect example of regulation aimed at ensuring adequate service at just and reasonable charges.

Moreover, the Commission's decision to require an access charge is as necessary to the regulation of the interstate network and as much a matter of interstate concern

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[19] " '[I]n the absence of compelling evidence that such was not Congress' intention . . . [courts should not] prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' " *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

—yet of far less intrastate impact—as its decisions in *NCUC II* and *Computer II*, where the courts have already rejected claims that Commission actions exceeded the limits of Section 2(b)(1).

The Commission's decision in *NCUC II* prohibited state restraints on interconnection of terminal equipment used for both interstate and intrastate communication, but much less for the former.[20] It was upheld notwithstanding claims that this action would significantly impact intrastate ratemaking by permitting increased substitution of private equipment for carrier-provided equipment, in turn reducing revenues and the corresponding amount of money available to subsidize other services and facilities. 552 F.2d at 1048. The Commission's decision in *Computer II* required intrastate detariffing of terminal equipment used for both interstate and intrastate communication. It was upheld despite this preemption of state ratemaking authority. 693 F.2d at 215-16. Just as the courts of appeals in *NCUC II* and *Computer II* correctly rejected claims under Section 2(b)(1) that the Commission had unlawfully intruded on state jurisdiction, without prompting further review here, so the court below correctly rejected the same claims in this case, and further review here is not warranted.[21]

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[20] *See NCUC II*, 552 F.2d at 1044 & n.7.

[21] This Court itself has rejected similar claims under the Federal Power Act. Also respondent to the "Shreveport Doctrine," see discussion, *supra*, p. 13 n.18, that Act prohibits Federal Power Commission regulation of retail (intrastate) electric rates. This Court has unanimously held, however, that the FPC is not precluded from adjusting wholesale (interstate) rates to respond to the problem of a discriminatory relationship between wholesale and retail rates. *See FPC v. Conway Corp.*, 426 U.S. 271 (1976). Notwithstanding the FPC's own contrary arguments, the jurisdictional limitation inspired by reaction to the "Shreveport Doctrine" meant only that the FPC could not set retail rates to remedy the problem. *Id.* at 277.

Section 221(b) is also not a jurisdictional bar to the access charge. The courts of appeals have consistently rejected arguments construing that provision to preclude Commission jurisdiction over exchange services generally. *See Computer II*, 693 F.2d at 216-17; *NCUC II*, 552 F.2d at 1045; *NCUC I* 537 F.2d at 795. Rather, the clear purpose of that provision is to prevent the Commission from exercising jurisdiction over a local exchange that the Commission would not otherwise be able to exercise but for the fact that the exchange straddles a state boundary. As in *NCUC I* and *II* and *Computer II*, where the states also sought review here, the court below correctly rejected the Section 221(b) claim, and further review is not warranted.

Petitioners' view that Sections 2(b)(1) and 221(b) preclude an end user access charge is an effort to parlay the limited purposes of those statutory exceptions into an emasculation of the regulatory powers specifically granted the Commission to achieve objectives clearly set forth in the Act.[22] The Court of Appeals correctly read the Act not to take with one hand the clear authority that it gives with the other—authority necessary to assure economic viability and just and reasonable charges for interstate communications.

B. The Imposition of Access Charges Through "Connecting Carriers" Is Within the Commission's Authority Under the Communications Act.

Petitioners also claim that the end user access charge exceeds the limitation of Section 2(b)(2) of the Act, which precludes the Commission from exercising jurisdic-

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[22] "Since provisos and exceptions in statutes are intended to restrain or except that which otherwise would be within the scope of the general language, they must be strictly construed and limited to objects fairly within their terms." *Rochester Tel. Corp. v. United States*, 23 F. Supp. 634, 636 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939) (construing Section 2(b)).

tion with respect to "any carrier engaged in interstate . . . communications solely through physical connection with the facilities of another [unaffiliated] carrier . . . ." They argue that because local exchange carriers, particularly after the divestiture required by the AT&T antitrust consent decree, cannot engage in interexchange activities, they are "connecting carriers" under Section 2(b)(2) whom the Commission may not require to impose access charges.

It is not necessary to decide, however, whether the Bell Operating Companies or other exchange carriers who always were independent of the AT&T system are connecting carriers, for the Court of Appeals correctly ruled that Sections 201 through 205 of the Act authorized the Commission to require connecting carriers to impose access charges. Under Section 2(b), Sections 201 to 205 of the Act expressly apply to the carriers that Section 2(b)(2) covers, except as otherwise provided in those sections. Section 205(a) specifically authorizes the Commission to prescribe just and reasonable charges for "any carrier or carriers" whose charges are found not to be just and reasonable or otherwise in violation of the Act. The Commission made just such findings as to the interstate rate structures existing prior to its access charge decision [23] and has now acted to establish guidelines for lawful rate structures.[24] Nothing in Section 205(a) exempts connecting carriers from this authority.[25]

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[23] *See Third Report and Order*, 93 F.C.C.2d at 256-58.

[24] *Cf. Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (holding Commission had authority to prescribe rates for and require tariff filings by connecting carrier under Section 4(i) of the Act, 47 U.S.C. § 154(i)).

[25] As the Court of Appeals ruled, 737 F.2d at 1115 n.23, although Section 203 exempts connecting carriers from the ministerial task of filing tariffs with the Commission, because the Section 203 filings of a non-connecting carrier show "all charges for itself and its con-

Thus, although the reach of Sections 201 through 205 is not limitless, only a very niggardly reading of those sections allows the view that end user access charges cannot be imposed pursuant to them.[26] Numerous Supreme Court and court of appeals decisions make it clear, however, that the provisions of the Communications Act, including Sections 201 to 205, are not to be construed so narrowly.[27]

C. The Commission's Actions Have Not Preempted any State Jurisdiction.

Petitioners struggle to pump significance into this case with the claim that because no incompatible state action is involved here, the Commission has improperly pre-

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necting carriers," it does not follow that a connecting carrier's tariffs are not subject to Commission review, let alone that connecting carriers are not not subject to Section 205(a).

[26] The Commission's ratemaking jurisdiction over connecting carriers under Sections 201 to 205 also lays to rest the view that connecting carriers, particularly after the AT&T consent decree, are no longer subject to the jurisdictional cost allocation required under *Smith v. Illinois Bell Telephone Co.* *See* Wis. Pet. at 13. Indeed, *Smith* itself is a refutation of that view, for it plainly holds that local plant is used, in part, to provide interstate service. Nothing in Section 2(b)(2) or the AT&T decree changes this jurisdictional fact.

[27] *See NCUC I*, 537 F.2d at 792, 793 (Section 2(b) does not "sanction[] any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially upon the Commission's authority under Sections 201 through 205"); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 736 (2d Cir. 1973) (upholding Commission action prohibiting connecting carriers from engaging in data processing business on basis of Sections 201 to 205, except through separate subsidiaries). *See also United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968) (declining to "construe the Act so restrictively" as to preclude Commission jurisdiction over cable television systems because such systems were located entirely within state boundaries).

empted state jurisdiction.[28] In so doing, Petitioners could not have erected a better strawman, for in point of fact there has been no preemption. The absence of incompatible state action reflects precisely this state of affairs. Indeed, given this absence of incompatible state regulation, one is left all the more to wonder just how it is that Petitioners believe the Commission has intruded upon jurisdiction reserved to the states.

There is plainly no basis for any claim that the Commission has preempted state jurisdiction. The states continue to have complete discretion to determine the charges for recovering costs allocated to intrastate service pursuant to *Smith* and to determine on whom those charges will be imposed. Petitioners, moreover, point to no state order or regulation that the Commission has preempted. Nor do the Commission's access charge orders anywhere declare that state authority is being preempted.[29]

At best, therefore, the "preemption" Petitioners claim is the imposition of access charges on "their ratepayers," meaning, presumably, local exchange subscribers.[30] As discussed above, however, this claim merely begs the question of which persons are responsible for interstate costs and on whom, therefore, charges for the recovery of such costs may be imposed. Ultimately, it fails to recognize that one person may be subject to multiple jurisdictions and, therefore, multiple charges.

In short, the jurisdictional claims that are at the core of Petitioners' challenge to the Commission's access charge decision do not merit review here, any more than did similar jurisdictional claims in *NCUC I* and *II* and *Com-*

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[28] N.Y. Pet. at 15-16.

[29] The Commission, in fact, has stated quite the contrary. *See Third Report and Order*, 93 F.C.C.2d at 260.

[30] N.Y. Pet. at 13.

puter II, where this Court also declined review. The Commission's decision does not raise any novel legal question about the correct construction of the Communications Act's division of federal and state authority. Instead, the decision is in keeping with an increasingly lengthy line of decisions construing the Act to authorize Commission regulation of interstate matters, notwithstanding the impact of that regulation on intrastate concerns. *See NCUC I* and *II* and *Computer II*.

III. The Decision Below Correctly Determined That the Commission's Access Charge Decision Was a Reasonable and Adequately Based Exercise of Agency Authority.

Petitioners contend that the Commission's access charge decision is arbitrary and, therefore, a violation of the Communications Act and "equal protection for the consuming public."[31] The Court of Appeals noted, however, that the problem the Commission addressed was very much predictive in nature.[32] "'[P]ure factual determinations,'" therefore, were not required to support the Commission's actions.[33] The court also noted "the leeway the FCC has to make 'deductions based on [its] expert knowledge.'"[34] Accordingly, after carefully examining the

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[31] Fla. Pet. at 22-26. Because Petitioners here challenge federal action regulating economic matters, their claim—whether tested under the Act or the Constitution—presumably is not and, in any case, could not legally be any more than the proposition that the Commission has acted arbitrarily or unreasonably in requiring an access charge for telephone subscribers. *See United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-77 (1981); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970); *Associated Press v. FCC*, 452 F.2d 1290, 1299-1302 (D.C. Cir. 1969) (separate rates for press tested under Act by arbitrary and unreasonable standard).

[32] 737 F.2d at 1117-18.

[33] *Id.* at 1117, quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981).

[34] 737 F.2d at 1117, quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

Commission's decision, the court ruled that the Commission's assessment of the bypass risk was adequately supported and that its decision to address the risk by requiring an end user access charge was not unreasonable.[35]

In reviewing the Commission's determinations, therefore, the court below plainly applied the proper legal standard for reviewing agency action. Petitioners do not challenge the standard applied.[36] Nor does anything Petitioners raise here suggest the standard failed in the court's application of it.

Petitioners first contend that the end user access charge is regressive and, therefore, does not ensure universal service. Whether or not the access charge is regressive, however, the issue of whether the Commission had appropriately treated relief for end users unable to pay any access charge was not before the Court of Appeals because the Commission had deferred the matter to future proceedings.[37] In any case, that the burden of a uniform

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[35] 737 F.2d at 1117.

[36] The applicable standard of review, of course, requires that the agency's action not be arbitrary or unreasonable, but in problems predictive in nature, neither definitive analysis nor pure factual determinations are required to support the action. *See FCC v. WNCN Listeners Guild*, 450 U.S. at 594; *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 814; *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). *See also United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 749 (1972) ("we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported").

[37] 737 F.2d at 1117. Section 4(j) of the Communications Act, 47 U.S.C. § 154(j), gives the Commission the discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice . . . ." *See Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (upholding FCC decision to approve a rate of return for AT&T at the completion of the first phase of a two-phase investigation, even though a related issue as

charge falls unevenly on subscribers does not make it unreasonable or discriminatory.[38]

The access charge scheme is also not unreasonable or discriminatory because of its uniform nationwide nature. The uniformity results from the Commission's desire to permit a gradual adjustment instead of immediately requiring an access charge based on interstate NTS costs allocated entirely to end users. Thus, in all areas, the initial residential and single line business charge of two dollars is well below the charge that would result from an allocation of all interstate NTS costs to end user access charges.[39] The multi-line business charge of $6 is below the latter in nearly all areas and below the national interstate cost average of seven dollars per subscriber line.[40]

That the initial access charge will cause a greater percentage overall rate increase in some areas than in others merely reflects the pre-existing differences in costs for local telephone service around the country. In addition,

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to the earnings of AT&T's manufacturing subsidiary, Western Electric, remained to be determined in phase two of the investigation). A court may not direct the Commission to order its docket and consider cases with any particular priority. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *but cf. Telecommunications Research and Action Center v. FCC*, slip op. (D.C. Cir. No. 84-1035 October 24, 1984).

[38] *See Dandridge v. Williams*, 397 U.S. at 485-86 (welfare benefits granted without reference to family size not unlawfully discriminatory).

[39] The two dollar charge was established by the orders under review. The Commission, however, recently reduced this charge to one dollar. See discussion, *infra*, p. 25 n.45.

[40] The business line charge is actually less than $6 dollars in many areas because the Commission's access charge rules temporarily establish a ceiling on all charges that should be somewhere between four and six dollars. *See Reconsideration Order*, 48 Fed. Reg. at 42989 n.22. Indeed, in the tariffs that actually have been filed by Bell Operating Company Respondents, the charges nationwide range from $2.78 to the six dollar maximum.

access charge uniformity will continue because of the Commission's decision to help preserve universal service through nationwide averaging and by recovering any area's above average NTS costs through carrier access charges rather than end user charges.

Finally, Petitioners' claims that the access charge encourages bypass and will as a result leave investment in exchange plant stranded, increasing the cost of telephone service, is flatly contradicted by the Commission's determinations on this point after its own careful study and findings. Petitioners, therefore, would have the court below and ultimately this Court substitute their judgment for the Commission's. This is plainly beyond the scope of appellate review.[41]

In short, therefore, there is nothing unreasonable or discriminatory about the end user access charge. Rather, the charge is the product of Commission efforts to accommodate competing objectives, all of which are within the public interest that the Commission is charged with advancing.[42]

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[41] *See Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (even though the reviewing court's "inquiry into the facts is to be searching and careful," in assessing whether the agency's action is " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' " "[t]he court is not empowered to substitute its judgment for that of the agency"); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981) (in reviewing agency's selection of cost allocation principles for ratemaking purposes, court may only review reasonableness of decision but not substitute its judgment for agency's).

[42] *See MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 415-16 (D.C. Cir. 1982) (" 'political' " nature of cost allocation method selected by agency for ratemaking purposes was not invalid for that reason because "there is no purely economic method of allocation" where "elements of fairness and other noneconomic values inevitably enter the analysis of the choice to be made").

IV. Petitioners Seek a Redefinition of the Jurisdictional Division Between the Commission and the States That Is a Legislative Matter Not Suitable for Judicial Review.

The Court of Appeals has already reviewed the Commission's actions, correctly applying the applicable standards of review. Moreover, the questions of law presented to it concerning the Commission's jurisdiction have already been resolved in several prior court of appeals decisions without need for review here. Consistently with those decisions, the court below correctly ruled that the Commission did not exceed its jurisdiction in requiring end user access charges. There is, therefore, nothing new for review here.

Indeed, this controversy, at bottom, does not really involve legal questions concerning construction of the Communications Act. Instead, it reflects the states' disagreement with the manner in which Congress has divided jurisdiction to regulate telephone service. This dispute has its origin with the early requirement that local exchange costs be allocated between those attributable to providing interstate service and those attributable to providing intrastate service. *See Smith v. Illinois Bell Telephone Co., supra.* Then Congress, in enacting the Communications Act, continued to leave recovery of interstate costs under federal jurisdiction.

This division of responsibility sowed the seeds for inevitable tension between the state and federal jurisdictions. The recovery of exchange costs depends on imposing charges for various services at levels which will not so dampen telephone subscribership or usage as to result in a shortfall of the revenues required to cover costs. Consequently, state decisions to impose charges on certain persons for the recovery of intrastate costs practically constrain Commission decisions to impose additional

charges for the recovery of interstate costs on the same persons, and conversely.[43]

Petitioners' claims here that certain categories of persons are not subject to interstate charges, even though interstate costs are incurred for their benefit, are, therefore, ultimately an effort to revisit and resolve through judicial review the division of jurisdiction Congress legislatively confirmed with the Communications Act and the tensions inherent in that division.[44] Whether or not there should be some readjustment of jurisdiction to alleviate these difficulties, it is not an appropriate judicial undertaking but a legislative task involving competing matters of economic policy, national communications policy and state, federal and consumer interests.[45]

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[43] As one Petitioner notes (Fla. Pet. at 8): "The system seems straight-forward enough, and it would be if the [telephone] companies' activities were exclusively within the province of one jurisdiction."

[44] *See, e.g.*, Fla. Pet. at 26: "The states . . . believe that they are in a better position to set rate structures on a local basis carrying out the national policy of protecting universal service."

[45] *Cf. American Commercial Lines, Inc. v. Louisville & Nashville R.R.*, 392 U.S. 571, 586-89 n.16 (1968) ("This Court is not particularly suited to pass on the merits of the economic arguments made by the railroads' expert witnesses in these cases . . . . Our discussion here . . . is merely intended to illustrate the desirability of having the initial resolution of these issues made by a tribunal, and in a proceeding, more suitable than the present one"); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142 (1940) ("To a large degree [modern administrative tribunals] have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could [not] effectively be exercised directly . . . by the judicial process").

Indeed, the statutory devices for accommodating the competing interests are in place and functioning. Thus, as a result of the state and federal Joint Board procedures established in Section 410 of the Act, the Commission now has considered and adopted a Joint Board recommendation to reduce the residential and single line business access charge from two dollars to one. *See* Communications Daily, Dec. 20, 1984, at 1.

The Court of Appeals correctly determined that the Commission did not exceed its jurisdiction and that the Commission's access charge decision was adequately supported and reasonable. Insofar as this Court is concerned, that should be the end of the matter. No review here, therefore, is warranted.

CONCLUSION

For the reasons stated above, this Court should deny the petitions in Nos. 84-816, 84-824 and 84-856 and not issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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January 7, 1985